

COMMISSION DIRECTIVE

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| ADMINISTRATIVE MATTERS | <input type="checkbox"/> | DATE | <u>August 30, 2006</u> |
| MOTOR CARRIER MATTERS | <input type="checkbox"/> | DOCKET NO. | <u>2005-57-C</u> |
| UTILITIES MATTERS | <input checked="" type="checkbox"/> | | <u></u> |

SUBJECT:

DOCKET NO. 2005-57-C – Joint Petition for Arbitration on Behalf of NewSouth Communications Corporation, NuVox Communications, Incorporated, KMC Telecom V, Incorporated, KMC Telecom III, LLC and Xspedius [Affiliates] (Joint-Petitioners) of an Interconnection Agreement with BellSouth Telecommunications, Incorporated (BellSouth) Pursuant to Section 252(b) of the Communications Act of 1934, As Amended - Discuss this matter with the Commission.

COMMISSION ACTION:

Mr. Chairman, there are twelve unresolved issues in this arbitration action, and I would move that we rule on them as follows:

- 1) With regard to Issue 4, which concerns limitation on liability in circumstances other than gross negligence or willful misconduct, I believe that the BellSouth position is correct, and that is that the liability of the provisioning party should be limited to a credit for the actual cost of the services or functions not performed or improperly performed.
- 2) With regard to Issue 5, which concerns limitation of liability terms in contracts, I would move that we adopt the BellSouth position in this case. BellSouth stated that if a CLEC elects not to limit its liability to its end users or customers in accordance with industry norms, the CLEC should bear the risk of loss arising from that business decision. I agree with that statement.
- 3) Issue 6 really asks us to define "indirect, incidental, or consequential" damages. I believe that we should adopt the BellSouth position, which states that such damages are defined as a matter of state law at the time of the claim.
- 4) Issue 7 requests that this Commission determine indemnification obligations under the proposed interconnection agreement. Naturally, each party believes that the other one should be providing indemnification for any claims, losses, or damages. The parties have already agreed to indemnify each other for damages caused by a receiving party's unlawful conduct, such as libel, slander, and invasion of privacy. I believe that the language in the interconnection agreement should also indicate cross-indemnification for claims, losses, or damages. This is actually a blend of the two proposed positions.
- 5) The parties ask us in Issue 9 to resolve the question of the proper venues for dispute resolution. The real question is which forum is appropriate for initial adjudication of disputes. I recommend adoption of the BellSouth position, which is that the first forum for disputes over interconnection agreements should be this Commission or the FCC, with a right of appeal to the Courts.
- 6) Issue 12 asks that we settle the question of whether the interconnection agreement should explicitly state that all existing laws, rules, regulations, decisions apply. The expressed fear by BellSouth is that if the interconnection agreement does explicitly make this statement, a party to the agreement may find a rule or ruling that was in existence at the time that the agreement is signed, and later attempt to assert new rights or privileges under the agreement based on that rule or ruling that no party had considered at the time that the agreement was signed. This has apparently actually happened on at least one occasion. I move that we adopt a blend of the two positions in this case, which would state that although applicable law would apply to the agreement, no party can assert new rights or privileges not already contained within the four corners of the interconnection agreement.
- 7) Issue 86 B requests that we state how disputes over alleged unauthorized access to customer service record information should be handled. The issue is whether BellSouth should be able to suspend services until the offending conduct is corrected, or whether the parties should proceed under the Dispute Resolution provisions in the agreement. I move that the Joint Petitioner's

position be adopted, and that the parties should proceed under Dispute Resolution in disputes over unauthorized access to customer service record information.

- 8) Issue 97 poses the question of when payment of charges for services should be due. The choice is between a due date of thirty calendar days from receipt or website posting of a complete and fully readable bill and payment for services being due on or before the next Payment Due Date. I move that we adopt the latter position, which is the BellSouth position, that is, payment being due on or before the next Payment Due Date. However, we should add the following language: "BellSouth should submit bills for mailing such that under normal circumstances, bill delivery may be expected at least 15 days prior to the Payment Due Date." This ensures that the recipient will receive bills in a reasonable time before the date the bill must be paid.
- 9) Issue 100 has to do with whether a CLEC should be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for non-payment to avoid suspension or termination. I move that a CLEC should be required to pay all **undisputed** amounts that are past due as of the date of the pending suspension or termination action.
- 10) Issue 101 asks us to decide how many months of billing should be used to determine the maximum amount of a deposit. I move adoption of the Joint Petitioner's position, which is that the maximum deposit should not exceed one month's billing for services billed in advance and two month's billing for services billed in arrears. This amount was agreed to in a DeltaCom-BellSouth agreement.
- 11) With regard to Issue 102, we have been asked to decide whether the amount of the deposit that BellSouth requires from a CLEC should be reduced by past due amounts owed by BellSouth to the CLEC. I move that we adopt the offer that BellSouth has made in its Brief, which is, that when BellSouth makes a deposit demand or a request for an additional deposit, it will reduce its deposit demand by the undisputed amount past due, if any, owed by BellSouth to any of the Joint Petitioners for payments. Upon BellSouth's payment of such amount, the Joint Petitioners should immediately be required to increase the deposit in an amount equal to such payments. This is an adoption of the Joint Petitioner's position, but with BellSouth's consent.
- 12) Finally, Issue 103 asks whether BellSouth should be entitled to terminate service to a CLEC due to non-payment if the CLEC refuses to remit any deposit required by BellSouth within 30 calendar days. I move adoption of the BellSouth position on this issue. I believe that we should hold that BellSouth should be entitled to terminate service under those stated conditions.

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| PRESIDING | <u>Hamilton</u> | | | | | |
| | MOTION | YES | NO | OTHER | APPROVED | <input type="checkbox"/> |
| | | | | | APPROVED STC 30 DAYS | <input type="checkbox"/> |
| CLYBURN | <input type="checkbox"/> | <input checked="" type="checkbox"/> | X ** | | ACCEPTED FOR FILING | <input type="checkbox"/> |
| FLEMING | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | | DENIED | <input type="checkbox"/> |
| HAMILTON | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | | AMENDED | <input type="checkbox"/> |
| HOWARD | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Absent | TRANSFERRED | <input type="checkbox"/> |
| MITCHELL | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | | SUSPENDED | <input type="checkbox"/> |
| MOSELEY | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | | CANCELED | <input type="checkbox"/> |
| WRIGHT | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | | SET FOR HEARING | <input type="checkbox"/> |
| | | | | | ADVISED | <input type="checkbox"/> |
| Session: | Regular | | | | CARRIED OVER | <input type="checkbox"/> |
| Time of Session | <u>2:30 PM</u> | | | | RECORDED BY | <u>JBS</u> |

Commissioner Howard was on Annual Leave.

**Commissioner Clyburn voted against Item # 9 of the Motion